

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LEVON J. MOORE,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 01-4500
DONALD T. VAUGHN, et al,	:	
Respondents.	:	

**Memorandum**

**GREEN, S.J.**

**November 16, 2004**

Presently pending is the Amended Report and Recommendation (the "Amended Report") filed by United States Magistrate Judge Linda Caracappa, Petitioner's Objections, and Respondents' Objections thereto. For the reasons set forth below, both Petitioner's and Respondents' Objections will be overruled and the Report and Recommendation will be approved and adopted.

**FACTUAL AND PROCEDURAL BACKGROUND**

The factual and procedural background of this matter have been set forth at length in the Amended Report, are not disputed by the parties, and will be incorporated by reference herein. In the instant petition, Mr. Moore petitioned for habeas corpus relief on five grounds: (1) ineffective assistance of trial counsel for the asserted failure to challenge the lawfulness of Petitioner's arrest; (2) the trial court erred in failing to declare a mistrial when a witness, listed as a non-identifying witness, identified Petitioner during the course of the trial; (3) ineffective assistance of trial counsel for informing the court of a conversation held between Petitioner and trial counsel "evidencing a purported change in fact and failing to argue a viable alibi defense to the jury"; (4) the sentence imposed was outside of the states guidelines and that the trial court

provided improper reasons for imposing the sentence; and (5) counsel appointed to represent Petitioner during the Pennsylvania Collateral Relief Act proceedings (“PCRA”) was ineffective.

The Amended Report recommends that the petition be denied. The Magistrate Judge first concluded that the instant petition was timely filed; a conclusion to which the Respondents object. The Amended Report further concludes that although the instant petition was timely filed, it should nevertheless be denied because Petitioner fails to establish a basis for habeas corpus relief. Petitioner objects to the Amended Report and argues that : (1) a mistrial should have been granted for “manifest necessity” due to the in-court identification of Petitioner by a witness designated by the prosecution as a non-identifying witness; (2) trial counsel was ineffective for failing to argue an alibi defense on Petitioner’s behalf and also because trial counsel informed the trial judge of privileged communications between counsel and Petitioner; and, (3) trial counsel was ineffective for failing to impeach a prosecution witness. The Court will first address Petitioner’s Objections, and then Respondents Objections to the Amended Report.

## **DISCUSSION**

A petition for habeas corpus relief will not be granted unless the Petitioner can establish that the state court’s determination of his claims resulted in a decision that was “contrary to, or involved an unreasonable application of, clearly established federal law..., or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” Williams v. Taylor, 529 U.S. 362, 130 C. Ct. 1495, 1504 (2000).

### **I. Mistrial**

Petitioner argues that a mistrial should have been granted because a witness designated by

the prosecutor as a non-identifying witness identified Petitioner at trial. Petitioner argues that the trial judge's curative instructions to the jury regarding the witness's identification of Petitioner were nullified by the prosecutor's continued references to that identification.<sup>1</sup> Petitioner argues that a new trial is necessary under the law because he has demonstrated that a new trial is a manifest necessity. The Pennsylvania Superior court determined that the curative instruction issued by the trial judge was fair and sufficient and that Petitioner did not demonstrate that granting a new trial was a manifest necessity. The Pennsylvania Superior could properly determine that there was no violation of state or federal law based upon its factual determination that there was no manifest necessity for a new trial. In order to demonstrate manifest necessity, a petitioner must demonstrate that there was no alternative to a mistrial. The trial judge issued an appropriate and sufficient curative instruction to remedy the prosecution witness's identification. Therefore, this court agrees that Petitioner did not demonstrate that granting a mistrial was a manifest necessity. Petitioner's Objection on this ground will be overruled.

## **II. Ineffective Assistance of Counsel**

Petitioner concludes that trial counsel was ineffective, and that habeas corpus relief should be granted, because counsel: (1) disclosed Petitioner's communication with counsel to the trial judge; (2) did not argue an alibi defense; and (3) failed to impeach a prosecution witness.

When reviewing a claim for ineffective assistance of counsel, courts must review the totality of evidence presented to the trial court and determine whether a petitioner has

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<sup>1</sup> The trial judge issued the following curative instruction: "Ladies and gentlemen of the jury, earlier this witness made a reference on two occasions about the defendant and a taller man. I am instructing you now that you are not to take that into consideration in your deliberations. You are in no way to deliberate with regard to what she said with regard to the defendant and a taller man. This witness is not an identifying witness. She has not made an identification."

demonstrated that the decision reached is reasonably likely to have been different, but for the alleged ineffectiveness of counsel. Strickland v. Washington, 466 U.S. 688, 695, 104 S.Ct 2052 (1984). Petitioner admitted to trial counsel that he attempted to throw a gun from the vehicle in which he was riding. Petitioner claims that he never stated that the gun was his, and that because he never admitted to owning the gun, he could not have offered perjurious testimony about the gun. Subsequent to discussions with Petitioner, and based upon his belief that Petitioner would state that he did not throw the gun out of the car if he testified, trial counsel notified the court of Petitioner's earlier revelation. This court agrees that trial counsel was obligated to notify the court of the possibility of perjury. Although Petitioner claims he never admitted to owning the gun, it does not follow that trial counsel could not have reasonably believed that Petitioner would offer false testimony about Petitioner's previously disclosed activities with the gun. Another person's ownership of the gun does not preclude possession by Petitioner at the time of the robbery. Under the circumstances, trial counsel's belief of possible perjury was reasonable. Moreover, Petitioner has not demonstrated that a different decision would have been reached at trial if counsel had not notified the court of the possible perjury. Petitioner's objection on this claim of ineffective assistance of counsel will be overruled.

Petitioner further objects to the Amended Report based upon his assertion that trial counsel should have argued an alibi defense during closing arguments. Petitioner asserts that other witnesses testified concerning Petitioner's alibi defense and that trial counsel should have argued it. However, as the Amended Report noted, there was conflicting testimony regarding Petitioner's activities and whereabouts on the day of the robbery. Given the contradictions in witness testimony, trial counsel could have made a reasonable tactical decision not to argue an

alibi defense. Therefore, the court cannot find that trial counsel rendered ineffective assistance on this issue.

Petitioner's final objection regarding ineffective assistance arise from his claim that trial counsel should have used an available audiotape of a police broadcast to impeach a police officer's testimony about the description of the victim's vehicle. This court concludes that the state court's determination, that there was overwhelming evidence against Petitioner due to the supporting testimony from another officer, is not contrary to, nor an unreasonable application of, clearly established federal law. Additionally, Petitioner fails to demonstrate that there was a reasonable probability that but for counsel's failure to impeach the officer regarding the vehicle description, the result of his criminal trial would have been different. Petitioner's objection on this ground will be overruled.

### **III. Equitable Tolling**

Respondents also object to the Amended Report. Essentially, Respondents argue that equitable tolling should not have been applied to the instant petition for habeas corpus relief. In November 2000, Petitioner filed a petition for habeas corpus relief that was not inclusive of all of the claims made in the instant petition. Petitioner's statutory deadline for timely filing was in mid-February 2001. Subsequent to the February 2001 filing deadline, in May 2001, this Court sent Petitioner a Mason/Miller notice stating:

The petitioner filed a pro se motion seeking habeas corpus relief under 28 U.S.C. § 2254. The petitioner is informed that it is essential that a habeas corpus motion include all potential claims for which a petitioner might desire to seek review and relief because a second or successive habeas corpus motion cannot be filed except under very specific and rare circumstance requiring certification by the Third Circuit Court of Appeals. The petitioner should inform the court immediately whether he wishes to proceed with the pro se motion, or withdraw the pro se

motion and file one new, all-inclusive habeas corpus motion within the one year time limit set by 28 U.S.C. § 2244 by checking off the space below, signing it, and returning it to the court. If the pro se motion was filed within the one year time limit, and that limit has expired or will expire within the next 119 days, the Court will grant petitioner 120 days from the date of this Order to file one new all-inclusive habeas corpus motion. It is ORDERED this 9<sup>th</sup> Day of May 2001, that if no written notification of withdrawal is received within thirty (30) days of the date of this Order, the Court will proceed to decide the pro se motion as filed and captioned.”

Petitioner then withdrew the timely filed habeas corpus petition of November 2000, and subsequently filed the instant habeas corpus petition which incorporated claims which would have otherwise been time barred unless excused by equitable tolling.

The Magistrate Judge concluded, and this court agrees, that equitable tolling is appropriately applied to the instant petition. Equitable tolling is appropriate because Petitioner followed the instructions provided in a letter received from this court. Thus, the Magistrate’s consideration of the merits of claims that would have been otherwise time barred was appropriate. The statute of limitations was properly equitably tolled and the instant petition was timely filed. Respondents Objections are overruled.

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**ORDER**

**AND NOW**, this 16<sup>th</sup> day of November 2004, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections are **OVERRULED**.
2. Respondent's Objections are **OVERRULED**.
3. The Amended Report and Recommendation is **APPROVED** and **ADOPTED**.
4. There is no probable cause to issue a certificate of appealability.
5. The Clerk of Court shall mark this case closed for statistical purposes.

BY THE COURT:

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CLIFFORD SCOTT GREEN